72-744 FILE COPY

NOV 20 1972

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-7

FIRST NATIONAL BANK AT LUBBOCK, TRUSTEE ESTATE OF VERA B. HARRELL, DECEASED,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROY BYRN BASS
18 Briercroft Office Park
Lubbock, Texas 79412
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions 3

Statement of the Case 4

Reasons for Granting the Writ—

1. Because of the fact that a judgment non obstante veredicto deprives the litigant of his constitutional right to a jury determination of the facts, there exists a need for a uniform standard and guideline on when these motions *are* and when they *are not* to be granted 5

2. Because the Supreme Court has not ruled, and neither The Internal Revenue Code nor regulations set forth, what quantum of proof is necessary to rebut the presumption that gifts made within three years of death have been made in contemplation of death, this Court should grant a writ in order to establish uniformity in the administration of tax laws 8

3. The holding of the Court of Appeals effectively discriminates in favor of those who transfer property for materialistic motives and against those who transfer property motivated by love and affection, thus denying them equal protection of the laws and depriving them of property without due process of law under the Fifth Amendment 10

Conclusion 12

Certificate of Service 12

Appendix—
Appendix A—Opinion, United States Court of Appeals for the Fifth Circuit A1
Appendix B—Judgment A11
Appendix C—Order Denying Petition for Rehearing A13

Table of Authorities

Cases

Allen v. *Trust Co. of Georgia*, 326 U.S. 630 (1946) 11
Boeing Company v. *Shipman*, 411 F 2d 365 (5th Cir. 1969) 5, 6, 8
Continental Ore Co. v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962) 7
Galloway v. *U. S.*, 319 U.S. 372 (1943) 9
Lavender v. *Kurn*, 327 U.S. 645 (1946) 5, 8-9
Parsons v. *Bedford*, 28 U.S. 266 (1830) 6
Planters Manufacturing Co. v. *Protection Mutual Insurance*, 380 F 2d 869 (5th Cir. 1967) 5
Tennant v. *Peoria and P.U.R. Co.*, 321 U.S. 29 (1933) 7
U. S. v. *Donruss*, 393 U.S. 297 (1968) 8
U. S. v. *Wells*, 283 U.S. 102 (1930) 2, 9, 11
U. S. v. *Zacks*, 375 U.S. 59 (1963) 8
Warner v. *Billups Eastern Petroleum Company*, 406 F 2d 1058 (4th Cir. 1969) 5

Constitutional Provisions and Statutes

Constitution of the United States—
Amendment V 3, 10
Amendment VII 2, 3, 6, 8

26 U.S.C.A. § 2035 ..... 2, 3
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1346(a)(1) 4
28 U.S.C. § 2402 4

TEXTS

2B Barron and Holtzoff, Federal Practice and Procedure, § 1015, pp. 401, 404 (Wright Ed. 1961) 6
9 Wright and Miller, Federal Practice and Procedure, § 2526, pp. 556, 559 (1971) 7

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

FIRST NATIONAL BANK AT LUBBOCK, TRUSTEE
ESTATE OF VERA B. HARRELL, DECEASED,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner First National Bank at Lubbock, Trustee (Estate of Vera B. Harrell, Deceased), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding July 12, 1972.

OPINION BELOW

The Court of Appeals' opinion, reported in 463 F 2d 716, appears as Appendix A hereto. No opinion was rendered by the District Court for the Northern District of Texas.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered July 12, 1972. A timely petition for rehearing was denied August 31, 1972, and this petition for certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. What quantum of evidence is necessary as a matter of law to raise a question of fact that must be resolved only by the jury as commanded by the Seventh Amendment, and by what standard is that quantum measured?

2. What amount of evidence is required to rebut the statutory presumption that a gift made within three years of death was made in contemplation of death?

3. Did the Court of Appeals err in holding that love and affection were insufficient life motives to defeat the "contemplation of death" presumption of 26 U.S.C.A. § 2035, and therefore, disregard the holding and dicta of *U. S.* v. *Wells*, 283 U.S. 102 (1930)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VII:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

26 U.S.C.A., Sec. 2035:

"(a). *General rule.*—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer . . . in contemplation of his death.

(b). *Application of General Rule.*—If the decedent within a period of 3 years ending with the date of his death . . . transferred an interest in property . . . such transfer . . . shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section . . ."

Amendment V:

"No person shall . . . be deprived of . . . property, without due process of law."

STATEMENT OF THE CASE

This is a taxpayer's suit under Title 28, United States Code, Section 1346(a)(1), and Section 2402, to recover estate taxes excessively and wrongfully collected by the Internal Revenue Service from Plaintiff as Independent Executor and Trustee under the will and of the Estate of Vera B. Harrell, Deceased. Decedent Vera B. Harrell, a 61-year old widow, died April 1, 1964. Within four months before she died, she made to her only child (an unmarried adult daughter) four gifts of property of a total value of $95,457.47.

On the estate tax return, Petitioner omitted this property. The Internal Revenue Service determined that the gifts were all in contemplation of death, and assessed a deficiency which Petitioner paid. Refund claim was timely made, and after disallowance, Petitioner sued for refund in the District Court for the Northern District of Texas.

The District Court submitted the case to a jury on four special issues (one for each gift). Upon the jury's verdict that none of the gifts was made in contemplation of death, a judgment was entered in Petitioner's favor for $25,853.63 plus interest and costs.

Respondent had timely moved for an instructed verdict, and later for judgment notwithstanding the verdict, both of which motions were overruled. The Court of Appeals reversed, and directed the District Court to enter for Respondent a judgment notwithstanding the verdict.

REASONS FOR GRANTING THE WRIT

1. Because of the fact that a judgment non obstante veredicto deprives the litigant of his constitutional right to a jury determination of the facts, there exists a need for a uniform standard and guideline on when these motions are and when they are not to be granted.

The Court of Appeals based its decision in this case on the holding of *Boeing Company* v. *Shipman*, 411 F 2d 365 (5th Cir. 1969), that a jury question is created only when there is a "conflict of substantial evidence" upon which reasonable men "might reach different conclusions." That holding overruled *Planters Manufacturing Co.* v. *Protection Mutual Insurance*, 380 F 2d 869 (5th Cir. 1967), which had held that only a complete absence of probative facts were grounds for taking the case from the jury.

Though *Planters* was based on *Lavender* v. *Kurn*, 327 U.S. 645 (1946), the court in *Boeing* reasoned that since *Lavender* was an FELA case, its holding did not apply to *non*-FELA cases. Such a result was based on the premise that since less proof was needed for the plaintiff to prevail in an FELA case, less proof was needed to send it to the jury.

The so-called "scintilla" test in FELA cases had been, according to the court in *Boeing*, "firmly rejected by the federal judiciary," *Boeing*, at 373. Yet later (p. 374) the court says that the task of formulating a proper test is compounded by the difference in formulations and language used by different legal writers. In light of the standard enunciated by the Fourth Circuit in *Warner* v. *Billups Eastern Petroleum Company*, 406 F 2d 1058 (4th Cir. 1969) the rejection of the "scintilla" test seems less than univer-

sal. That case held that a judgment n.o.v. should not be granted "if there *was any evidence* in the case that would authorize a verdict for the plaintiff," *Warner*, at 1059 (emphasis added). This is clearly the scintilla test alive and well in the Fourth Circuit in non-FELA cases, thus creating a conflict between circuits.

The importance of this issue is founded on the Seventh Amendment and its guarantee of a jury trial in all suits at common law. Using Justice Story's oft-quoted definition in *Parsons* v. *Bedford*, 28 U.S. 266, 274 (1830), an FELA action must be a "suit at common law" as it is not one in equity or admiralty. From this it can be argued that congress could not constitutionally give a broader rule to the jury in these statutory actions than that guaranteed by the Seventh Amendment, and that an FELA case represents the true extent of a jury's power. In his dissent in *Boeing*, Judge Rives persuasively argues that the FELA standard for sufficiency of the evidence is the constitutionally correct one being based on the Seventh Amendment:

> "With deference, I submit that when the majority repudiates the FELA standard and particularly that adopted in *Lavender* v. *Kurn*, . . ., it commits an error of constitutional proportion which will continue to plague this court and the district courts of this Circuit until the Supreme Court grants certiorari in this or some future case, and corrects the error." *Boeing Company, supra*, at 377-378.

Footnote 10 in *Boeing* quotes from 2B Barron and Holtzoff, Federal Practice and Procedure, § 1015, pp. 401, 404 (Wright Ed. 1961):

> "It is extremely important to know whether the decisions (in FELA and Jones Act cases) are confined

to the particular statutory actions in which they have been handed down. . ."

• • •

"A decision by the Supreme Court, clearly stating which view it takes as to the scope of FELA and Jones Act decisions, would be helpful guidance to the lower federal courts."

Interestingly enough, ten years later, the same writer reiterates the observation in 9 Wright and Miller, Federal Practice and Procedure, § 2526, pp. 556, 559 (1971):

"It is extremely important to know whether the decisions are confined to the particular statutory actions in which they have been handed down, or whether they represent a *construction of the Seventh Amendment*, and thus are *controlling in all jury cases in federal courts*.

• • •

"A decision by the Supreme Court, clearly stating which view it takes as to the scope of the FELA and Jones Act decisions would be helpful guidance to the lower federal courts." (Emphasis added)

As noted in Wright and Miller, *supra*, at 559, the Supreme Court has reversed several cases in a series of per curiam opinions where the lower courts substituted their views for those of the jury in *non*-FELA cases. The Supreme Court in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962) cited an FELA case, *Tennant* v. *Peoria and P.U.R. Co.*, 321 U.S. 29 (1933), in two places as the test for sufficiency of the evidence.

Because of the rarity with which the Supreme Court can indulge itself and examine the sufficiency of the evi-

dence as ruled upon by the district and appellate courts, a uniform and constitutional standard for passing upon the sufficiency of the evidence needs to be articulated. The lack of such a standard has led, and will lead, to situations where a litigant's constitutional right to a twelve man jury of his peers is replaced by a three man panel of appellate judges who merely substitute their conclusions of fact for those of the jury. If this is to be done, it should be done only in the context of a *definite standard* applied to relatively clear-cut cases.

2. Because the Supreme Court has not ruled, and neither The Internal Revenue Code nor regulations set forth, what quantum of proof is necessary to rebut the presumption that gifts made within three years of death have been made in contemplation of death, this Court should grant a writ in order to establish uniformity in the administration of tax laws.

It has granted writs for similar reasons in *U. S.* v. *Donruss*, 393 U.S. 297 (1968), and where there is a problem of recurring importance in tax law administration *U. S.* v. *Zacks*, 375 U.S. 59 (1963).

Petitioner will also argue that even if the substantial evidence rule announced in *Boeing* v. *Shipman* is correct, the quantum of evidence in this case is more than substantial, where Petitioner's testimony included six different witnesses and one witness called by Respondent, each testifying without contradiction to various facts consistent with dominant life motives for making gifts; that it violates Petitioner's rights under the Seventh Amendment for the Court of Appeals to ignore the unanimous jury verdict and substitute its own interpretation of the witnesses' credibility. This Court in *Lavender* v. *Kurn*, 327 U.S. 645

(1946) points out that in matters of judgment there will always be some speculation, and in *Galloway* v. *U. S.*, 319 U.S. 372 (1943) that an inference is unreasonable only if it is at war with uncontradicted or unimpeached facts. The "more than substantial" evidence may be tabulated as follows:

Substance of testimony	Witness	Appendix Reference
Love for donee	Vivian Hatch (sister)	p. 29
	Mary Burford (friend)	p. 33
	Lamoyane Harrell (donee)	p. 41-43
Custom of previous gifts for several years	Vivian Hatch (sister)	p. 29
	Lamoyane Harrell (donee)	p. 38-39
Income-producing assets as subject of gifts in question	Lamoyane Harrell (donee)	p. 41
	Decedent's attorney (adverse witness called originally by Government)	p. 59
Optimism and cheerfulness	Carl Bailey (school principal)	p. 25
	Vivian Hatch (sister)	p. 28
	Mary Burford (friend)	p. 33
	Lamoyane Harrell (donee)	p. 42
Appearance of good health	Dr. Douglas (physician)	p. 30 memo
	Lamoyane Harrell (donee)	p. 42
Christian commitment	Mr. Ewing (church administrator)	p. 26

This "substantial evidence" allowed the jury to follow the command of *U. S.* v. *Wells*, 283 U.S. 102 (1930), by determining the dominant motive of the decedent in light of her bodily and mental condition. To repudiate the jury's finding is a repudiation of this standard as articulated by the Supreme Court.

3. The holding of the Court of Appeals effectively discriminates in favor of those who transfer property for materialistic motives and against those who transfer property motivated by love and affection, thus denying them equal protection of the laws and depriving them of property without due process of law under the Fifth Amendment.

The Court of Appeals opinion states: "We only hold that under the particular circumstances here presented, taxpayer was unable to present specific evidence of life motive", but goes on to illustrate the philosophy prompting this holding: "For example, there was no indication that Lamuyane (donee) had any particular need or desire for which the money could be used, such as hobbies, travels, a new home, etc. No records were kept to establish that Mrs. Harrell's (donor's) purpose was to avoid income taxes, or that some other life motive was an impelling cause for the four gifts in question."

Neither the Internal Revenue Code, its attendant regulations, nor any opinion of The Supreme Court requires that only materialistic motives (such as the Court of Appeals describes) can qualify to rebut the presumption.

Petitioner will argue that there were in fact substantial materialistic motives in this case (App. in Court of Appeals, pp. 29, 38, 39, 41 and 59) but that if there were none, donor's love for donee was amply demonstrated (App. in Court of Appeals, pp. 29, 33, 38, 39, 41 and 43) and uncontradicted.

Regardless of whether the FELA test or non-FELA (*Boeing*) test is correct, the jury in this case could conclude that the dominant motive of the decedent in making the gifts was one of love and affection. The only basis on which the jury's verdict that the gift was not made in contemplation of death could be set aside would have to stand lodged on the premise that a dominant motive of

love and affection is insufficient to take a gift made within three years of death out of the "contemplation of death" presumption.

Following the Court of Appeals rationale, even had the decedent lived for two more years, the gifts would still be includable in her estate because they would be (1) within three years of the date of death and (2) motivated only by love and affection and not by any materialistic gain to the decedent or need of the recipient. This specifically controverts the Supreme Court's holding in *U. S.* v. *Wells*, *supra*, at 118:

> "If it is the thought of death as the controlling motive prompting the disposition of property that affords the test, it follows that the statute *does not embrace gifts inter vivos which spring from a different motive.*" (Emphasis added)

Love and affection must be classified as a brand of the expressed "different motive."

The mere fact that a person is *conscious* of death is not controlling. As Justice Douglas said in *Allen* v. *Trust Co. of Georgia*, 326 U.S. 630 (1946), all gifts made with the knowledge that they won't be included in one's estate are not necessarily made in contemplation of death, even when made to the natural object of the person's bounty. One should be able to make a gift motivated only by love without having his subsequent demise "change" his motive after the fact to one "in contemplation of death."

Because of the certainty with which people will die having made substantial gifts motivated by love within three years of death, the Supreme Court should clearly classify love and affection as an acceptable dominant life motive which would remove such gifts from the bounds of the contemplation of death presumption, especially when preceded, as in this case, with a history of prior gifts to the person to whom the gifts in question were made.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully,

ROY BYRN BASS
18 Briercroft Office Park
Lubbock, Texas 79412
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this ..... day of November, 1972, four copies each of The Petition for Writ of Certiorari were mailed, air mail postage prepaid, to

Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Scott P. Crampton
Assistant Attorney General
(Attn: Donald H. Olson)
Tax Division, Department of Justice
Washington, D. C. 20530

Frank McCown, Esq.
United States Attorney
Ft. Worth, Texas 76101

I further certify that all parties required to be served have been served.

ROY BYRN BASS
18 Briercroft Office Park
Lubbock, Texas 79412
Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1732

FIRST NATIONAL BANK AT LUBBOCK, Trustee,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

---

(July 12, 1972)

Before AINSWORTH, INGRAHAM and RONEY,
Circuit Judges.

INGRAHAM, Circuit Judge: This action was brought by taxpayer as executor of the estate of Vera Harrell for a refund of estate taxes paid. The Commissioner of Internal Revenue determined that four gifts of property made by decedent to her daughter within four months of death had been made "in contemplation of death" under § 2035

of the Internal Revenue Code,[1] and assessed a deficiency. Taxpayer's timely claim for refund having been disallowed, suit was instituted in the court below. The case was tried to a jury, which answered special interrogatories in favor of taxpayer, and the district court entered judgment on the jury's verdict.[2]

At the close of taxpayer's case and then at the end of all the evidence, the government moved for a directed verdict. Upon the entry of judgment, the government moved for judgment notwithstanding the verdict or, alternatively, for a new trial. These motions were denied and the government appeals from the judgment and order overruling its motion for judgment notwithstanding the verdict. We REVERSE.

The facts as brought out below indicate that on November 8, 1963, Mrs. Vera Harrell visited the office of her attorney to discuss the preparation of a will. Her attorney prepared a list of property that Mrs. Harrell owned, and an estimate of the value of the listed property. Her total assets were deemed to be $468,750, and the attorney roughly calculated that the federal estate and state inheritance taxes on an estate of this size would be $128,500. Mrs. Harrell expressed shock at the size of her estate and the attorney explained to her that she could reduce the estate's tax liability by making gifts of some of her property.

At the time of the visit to her attorney's office, Mrs. Harrell was a sixty-one year old widow, who had been a school teacher for over thirty years. She lived with her daughter, an only child, Lamoyane, who was unmarried, thirty-three years old, and also a teacher. After this visit

---

1. 26 U.S.C.A. § 2035.

2. Specifically, the jury's answers as to each of the four gifts was that they were not made in contemplation of death.

Mrs. Harrell, in December 1963, made the first gift in question to Lamoyane—four church bonds of the value of $2000. On January 6, 1964, an account in a savings and loan association, containing $6,081.84, which had previously been jointly owned, was placed solely in Lamoyane's name. The third gift in question was the placing on January 27, 1964, of a $2,375.63 account in the Lubbock Teacher's Federal Credit Union solely in Lamoyane's name.

In early February 1964 Mrs. Harrell seemed to be suffering from a skin disorder, and on February 7 she visited Dr. R. C. Douglas, a specialist in internal medicine located in Lubbock, Texas. No specific findings were made, but the doctor found an abnormal blood count. On February 10 a further examination was conducted and hospital tests were ordered in order to investigate a blood disorder. Mrs. Harrell was admitted to the hospital on February 11, 1964, for tests, including a bone marrow study, and Dr. Douglas wrote in Mrs. Harrell's physical examination history that his tentative diagnosis was "Undiagnosed hematological disease. Suspect aleukemic leukemia."[3] It was on that same day of admission to the hospital that Mrs. Harrell made the fourth gift to her daughter—8000 shares of Combined Insurance Company stock with a value of $85,000.

On February 19, 1964, Mrs. Harrell's will was executed, which provided that the home, automobile and household goods be left to the daughter, and that the residue of the estate be placed in trust with the income to the daughter for life.

On February 20, 1964, Mrs. Harrell's condition was improved and she was discharged. Dr. Douglas' report of this date suggested a suspected condition of aplastic anemia, but leukemia was not ruled out. Only forty-eight hours

3. This report was dated February 12, 1964.

later Mrs. Harrell was readmitted to the hospital with high fever. Dr. Douglas sought the advice of certain Dallas doctors and Mrs. Harrell was transferred to a Dallas hospital in March.

Dr. Douglas testified that he never specifically told Mrs. Harrell that she had a fatal disease or leukemia, but he did tell her that he had been looking for a serious disease and thus had ordered three bone marrow studies. He informed her of this at some time before the transfer to Dallas. Leukemia was firmly diagnosed in March, and Mrs. Harrell passed away on April 1, 1964.

Section 2035(a) of the Code provides in pertinent part that:

> "The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer . . . in contemplation of his death."

In addition, there is a statutory presumption provided by § 2035(b):

> "If the decedent within a period of 3 years ending with the date of his death . . . transferred an interest in property . . . such transfer . . . shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section . . . ."

The Treasury Regulations attempt to clarify the meaning of the words "in contemplation of death" as follows:

> "The phrase 'in contemplation of death', as used in this section, does not have reference to that general expectation of death such as all persons entertain. On the other hand, its meaning is not restricted to an apprehension that death is imminent or near. A trans-

fer 'in contemplation of death' is a disposition of property prompted by the thought of death (although it need not be solely so prompted). A transfer is prompted by the thought of death if (1) made with the purpose of avoiding death taxes, (2) made as a substitute for a testamentary disposition of the property, or (3) made for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized in order to determine whether or not such thought prompted the disposition."

This court in *Bel v. United States*, 452 F.2d 683 (5th Cir., 1971), recently explicated the general legal principles associated with § 2035:

"The underlying purpose of section 2035 is to prevent evasion of the federal estate tax by excising those transfers of a decedent which are essentially substitutes for testamentary dispositions. United States v. Wells, 1931, 283 U.S. 102, 116-117, 51 S.Ct. 446, 75 L.Ed. 867. Accordingly, the presumption embodied in section 2035(b) is rebuttable, for if a taxpayer can demonstrate that a donation made within the three-year period was not a substitute for a testamentary disposition, then the dominant purpose of section 2035 is not served by taxing such a transfer. Therefore, in every instance in which a transfer is effectuated within the statutory period, the crucial inquiry is whether or not the donation represents a testamentary substitute or in statutory terminology, whether or not the transfer was made "in contemplation of death.'

"The phrase 'in contemplation of death' does not encompass the general expectation of death which all

mortals entertain. Rather, the Supreme Court has held that a transfer is made in contemplation of death only if the thought of death is the impelling cause of the transfer. Allen v. Trust Co. of Georgia, 1946, 326 U.S. 630, 635, 66 S.Ct. 389, 90 L.Ed. 367. Of course, the statutory presumption casts upon the taxpayer the burden of proof as to the dominant, controlling, and impelling motive of the decedent in making a transfer. This means that the taxpayer has the task of persuading a court that in transferring property the decedent was not motivated by purposes associated with the distribution of property in anticipation of death. Fatter v. Usry, E.D.La. 1967, 269 F.Supp. 582. And, of course, whether or not any particular purpose was 'the dominant, controlling or impelling motive is a question of fact in each case.' Allen v. Trust Co. of Georgia, *supra*, 326 U.S. at 636, 66 S.Ct. at 392."

452 F.2d at 687.

It is thus clear that taxpayer had the burden of going forward with affirmative evidence to establish a dominant life motive for the gifts. See *Landorf v. United States*, 408 F.2d 461, 472 (Ct.Cl., 1969).[4] Taxpayer did introduce evidence of strong bonds of love and affection between decedent and her daughter, and there was testimony in the record that Mrs. Harrell was cheerful and optimistic about her health. Love and affection, however, are not sufficient under the circumstances here presented. Even were we to assume that Mrs. Harrell was unaware of the gravity of her illness, the record indicates overwhelming evidence of a desire and plan to get the prop-

4. The court in *Landorf* goes on to say: "Generally, both life and death motives are involved in these transfers and the inquiry, therefore, becomes whether the 'life' motives were the 'dominant controlling or impelling' reasons for the transfer." 408 F.2d at 472.

erty out of the estate to lessen the estate tax burden.[5] "While the only certainties in life might be death and taxes, the tax reaper cuts his swath within section 2035 when the conjunction of these certitudes has a contrived rather than an aleatory positivism." *Bel v. United States*, *supra*, at 688.

---

5. The following testimony from cross-examination of Mrs. Harrell's attorney is instructive:

"Q. Did you tell her or did you not tell her that she could avoid or minimize the estate tax by making gifts?

A. I told her that whatever she didn't own when she died normally would not be taxed. That's the language I generally use in talking to my clients along that line. . . .

Q. Now Mr. Bass, I'm going to recall for you the time that I had the conversation with you in your office. Didn't you inform me that you informed Mrs. Harrell that she could minimize her estate taxes, reduce the value of her estate by making gifts, and that Mrs. Harrell, pursuant to that advice, implemented this by making gifts to her daughter?

A. I know she made gifts after our conference.

Q. But that she made them pursuant to your advice?

A. I don't know about that.

Q. All right. Did Mrs. Harrell call you from time to time and tell you what gifts she made, and did you record them on this document?

A. On Defendant's Exhibit 1 here. I have marked Lamoyane's name by some of these assets here, showing that I had later learned that these gifts were made, but when I got that knowledge I really don't know.

Q. Do you recall telling me, Mr. Bass, that Mrs. Harrell, that is, the decedent, from time to time would call you and you would record it on this sheet to show that that eliminated part of her estate?

A. I don't recall that exact language, Mr. Guild. It may be that it was.

Q. In essence, isn't that what you told me?

A. I just don't remember.

Q. You don't remember?

A. I do know that I learned that she had made these gifts, but I don't remember how or when.

Q. All right. Let's take a look at Exhibit No. 1.

A. Yes, sir.

Q. There shows the State Savings & Loan, and it's written in darker pen. Do you see that, sir?

A. Yes, sir.

Q. And then in a lighter pen it says 'Lamoyane', is that correct?

A. Correct.

The determinative question is whether the evidence formed a sufficient basis to justify the district court's submitting this case to the jury. The applicable standard has been set forth in this court's en banc decision in *Boeing Company v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969):

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand if there is sub-

---

Footnote continued—

Q. You have got 'five thousand' crossed off?
A. Yes, sir.
Q. What does that State Savings & Loan actually refer to?
A. Either she gave me the wrong association or I misunderstood her, because I don't think she ever had one in State Savings & Loan. I think this has reference to the First Federal Savings & Loan account that is in dispute here in the lawsuit.
Q. That's right, about six thousand some odd dollars, right?
A. Yes, sir.
Q. That refers to one of the gifts?
A. Correct.
Q. Now, underneath the twelve thousand shares of Combined American Insurance stock, I see two thousand shares given to Lamoyane, 2/20/64?
A. Yes, sir.
Q. You put that in there afterward, isn't that correct?
A. That was the date that the transfer agent of the stock in Chicago acknowledged the receipt of the shares, I believe, yes sir.
Q. So that was in November you wrote that down, and some time, apparently on the 20th, or thereafter, you put down that this two thousand shares had been given to Lamoyane?
A. I believe that's correct."

stantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. *There must be a conflict in substantial evidence to create a jury question.* However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." (Emphasis added)

The testimony offered by taxpayer in the instant case was not sufficient to create a substantial conflict on the question of motivation, and thus the district court erred in submitting this case to the jury.[6] We make clear, however, that in so holding we are not enabling the government to rely on § 2035(b) as a virtually irrebuttable presumption. We only hold that under the particular circumstances here presented, taxpayer was unable to present specific evidence of life motive. For example, there was no indication that Lamoyane had any particular need or desire for which the money could be used, such as hobbies, travels, a new home, etc. No records were kept to establish that Mrs. Harrell's purpose was to avoid income taxes, or that some other life motive was an impelling cause for the four gifts in question.

---

6. See the dissenting opinion in *United States v. Generes*, 427 F.2d 279, 284-85 (5th Cir., 1970), and the Court's reversal, *United States v. Generes*, 405 U.S. 93, 104-107 (1972).

Accordingly, the judgment of the district court is REVERSED and the case is REMANDED with directions that a judgment notwithstanding the verdict be entered in favor of the United States.

REVERSED and REMANDED with directions.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-1732

D. C. Docket No. 5-721
FIRST NATIONAL BANK AT LUBBOCK, Trustee,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

---

Before AINSWORTH, INGRAHAM and RONEY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions that a judgment notwithstanding the verdict be entered in favor of the United States;

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Issued As Mandate: July 12, 1972

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1732

FIRST NATIONAL BANK AT LUBBOCK, Trustee,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

---

(August 31, 1972)

ON PETITION FOR REHEARING

Before AINSWORTH, INGRAHAM and RONEY,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.